EIGHT DEVELOPMENT (M) SDN BHD

v.

ANTARA STEEL MILLS SDN BHD

COURT OF APPEAL, KUALA LUMPUR
DENIS ONG JCA
MOHD NOOR AHMAD JCA
HASHIM YUSOFF JCA
[CIVIL APPEAL NO: W-02-806-1996]
16 JANUARY 2004

LAND LAW: *Sale of land - Breach of contract - Damages - Assessment of - Defendant failed to deliver vacant possession of premises - Premises held over and continually occupied by defendant's tenants - Whether plaintiff entitled to damages amounting to double market value of rental for premises - Civil Law Act 1956, s. 28(4) - Contracts Act 1950, s. 74(1)*

CONTRACT: *Sale and purchase of land - Breach - Damages - Assessment of - Defendant failed to deliver vacant possession of premises - Premises held over and continually occupied by defendant's tenants - Whether plaintiff entitled to damages amounting to double market value of rental for premises - Civil Law Act 1956, s. 28(4) - Contracts Act 1950, s. 74(1)*

CIVIL LAW ACT: *Damages - Claim for damages - Defendant failed to deliver vacant possession of premises - Premises held over and continually occupied by defendant's tenants - Whether plaintiff entitled to damages amounting to double market value of rental for premises - Civil Law Act 1956, s. 28(4)*

CIVIL PROCEDURE: *Interest - Damages - Pre-judgment interest on damages amounting to 8% per annum - Whether ought to be allowed*

CIVIL PROCEDURE: *Costs - Appeal as to costs - No order as to costs made by learned judge - Whether each party should bear its own costs*

This was an appeal by the plaintiff against the High Court judgment dismissing the appeals of both the plaintiff and the defendant in respect of the judgment of the learned senior assistant registrar ('SAR') on the assessment of damages. The plaintiff had purchased from the defendant two units of 4-storey shop-houses ('the shop-houses') and it was a term of the sales and purchase agreement ('the SPA') that the defendant deliver to the plaintiff vacant possession of the shop-houses free from encumbrances within seven days of the receipt of the purchase price. The defendant failed to deliver vacant

possession on the due date as the premises were held over and continually occupied by the defendant's tenants, Leong and Chandra. The plaintiff contended that the breach of the term in the SPA relating to vacant possession was a breach of a covenant or obligation, and sought damages amounting to double the market value of the rental of the shop-houses and interest on damages at the rate of 8% per annum from the date of the court order until full payment.

The SAR found that s. 28(4) of the Civil Law Act 1956 ('CLA') was not applicable and she refused the plaintiff's claim for double the amount of rent. She held that s. 74(1) of the Contracts Act 1950 ('CA') had been fulfilled and gave judgment for the plaintiff amounting to RM191,432 plus pre-judgment interest at 8% per annum. Both parties appealed; the learned judge confirmed the quantum of damages but disallowed the pre-judgment interest. He also rejected the plaintiff's submission for double the market value of rental for the premises. The contentious issues canvassed by the plaintiff were: (a) the learned judge's rejection of the plaintiff's submission for damages equivalent to double the market value of rental for the premises; (b) the learned judge's disallowance of pre-judgment interest on damages at 8% per annum directed by the SAR; and (c) the averment that the learned judge should have directed costs to be paid to the plaintiff by the defendant in respect of the defendant's appeal before him.

Held:

Per Denis Ong JCA

[1] With regard to (a), s. 28(4) of the CLA did not apply to the facts of the present appeal because the defendant never at any time occupied or held over the premises. To have invoked the use of that subsection and to have awarded double the market value to the plaintiff against the defendant would have been to penalise the wrong person, and as the SAR said correctly, a misuse of that section. Further, the nature of the obligation of the defendant (as vendor) to the plaintiff (as purchaser) under the covenant to give vacant possession of the premises on the due date differed substantially depending upon who wilfully held over the premises. In fact and in law, Chandra and Leong were the ones who continued in occupation of the premises and held over as tenants *vis-à-vis* the defendant as landlord. The option to charge double the value under s. 28(4) of the CLA would seem available to the defendant alone. Since they were strangers to this appeal, s. 28(4) of the CLA was not applicable. Therefore, the plaintiff was not entitled to rely on s. 28(4) of the CLA when claiming damages under s. 74(1) of the CA and the judgment of the learned judge on quantum of damages was upheld. (pp 50 f-h, 51 a-b & 54 e-f)

[2] With regard to (b), the learned judge stated no reason whatsoever for interfering with the exercise of judicial discretion by the SAR. Apart from the point that the pre-judgment interest was not pleaded – it was not necessary to plead – there was no complaint by the respondent about the rate or period of such interest. Since there was no ground to the contrary, the SAR's order on pre-judgment interest was restored. (p 56 c)

[3] With regard to (c), the learned judge made no order as to costs despite the defendant's partial success in winning its appeal against the award of pre-judgement interest. Before this court, the plaintiff won its appeal on pre-judgment interest but lost its appeal against quantum. Hence, a fair order would be that each party bears its own costs here and before the learned judge. (p 56 d-f)

[Order accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan plaintif terhadap keputusan Mahkamah Tinggi yang menolak rayuan kedua-dua plaintif dan defendan terhadap keputusan yang arif penolong kanan pendaftar ('SAR') berkaitan penilaian gantirugi. Plaintif telah membeli dua unit rumah kedai empat tingkat ('rumah kedai') dari defendan dan adalah menjadi terma perjanjian jual beli ('SPA') bahawa defendan akan menyerahkan milikan kosong yang bebas dari segala sekatan dalam masa tujuh hari dari tarikh penerimaan harga belian. Defendan gagal menyerahkan milikan kosong dalam tempoh yang ditetapkan oleh kerana premis berkenaan telah dipegang di luar masa dan terus diduduki oleh penyewa-penyewa defendan, Leong dan Chandra. Plaintif mengatakan bahawa kemungkiran terma di dalam SPA berkaitan milikan kosong adalah kemungkiran waad atau obligasi, dan berikutan itu memohon gantirugi dua kali ganda nilai pasaran sewa rumah kedai serta faedah atas gantirugi pada kadar 8% setahun dari tarikh perintah mahkamah hingga pembayaran sepenuhnya.

SAR mendapati bahawa s. 28(4) Akta Undang-Undang Sivil 1956 ('CLA') tidak terpakai dan menolak tuntutan plaintif bagi sewa dua kali ganda. Beliau seterusnya merumuskan bahawa kehendak s. 74(1) Akta Kontrak 1950 ('CA') telah dipenuhi dan kerana itu memberi penghakiman kepada plaintif berjumlah RM 191,432 serta faedah pra-penghakiman pada kadar 8% setahun. Kedua-dua pihak telah merayu; yang arif hakim mengesahkan kuantum gantirugi tetapi tidak membenarkan faedah pra-penghakiman. Yang arif hakim juga menolak hujah plaintif tentang sewa dua kali ganda nilai pasaran. Isu-isu perselisihan yang dibangkitkan oleh plaintif adalah mengenai: (a) penolakan yang arif hakim akan tuntutan gantirugi oleh plaintif yang bersamaan dengan dua kali ganda nilai pasaran sewa premis; (b) keputusan yang arif hakim tidak membenarkan

faedah pra-penghakiman pada kadar 8 % setahun seperti yang diarah oleh SAR; dan (c) hujah bahawa yang arif hakim sepatutnya mengarahkan kos dibayar oleh defendan kepada plaintif berhubung rayuan defendan di hadapannya.

Diputuskan:
Oleh Denis Ong HMR

[1] Berkaitan dengan (a), s. 28(4) CLA tidak terpakai kepada fakta rayuan semasa oleh kerana defendan tidak pernah menghuni atau memegang premis tersebut. Menggunapakai subseksyen tersebut dan memberikan award dua kali ganda nilai pasaran sewa kepada plaintif akan hanya menghukum orang yang tak bersalah, dan seperti yang dikatakan dengan benarnya oleh SAR, menyalah guna seksyen tersebut. Lagipun, sifat obligasi defendan (selaku penjual) kepada plaintif (selaku pembeli) untuk memberi milikan kosong premis pada tarikh yang ditetapkan di bawah waad amat berbeza sekali bergantung kepada siapa yang terus menerus memegang premis dengan sengajanya. Di sisi fakta dan undang-undang, Chandra dan Leong, sebagai penyewa-penyewa *vis-a-vis* defendan sebagai tuan rumah, adalah orang yang terus menduduki dan memegang premis di luar masa. Pilihan untuk mengenakan nilai dua kali ganda di bawah s. 28(4) CLA hanyalah dimiliki oleh defendan. Oleh itu, plaintif tidak berhak untuk bergantung kepada s. 28(4) CLA apabila menuntut gantirugi di bawah s. 74(1) CA dan keputusan yang arif hakim berkaitan kuantum gantirugi harus dikekalkan.

[2] Berhubung dengan (b), yang arif hakim tidak memberikan apa-apa alasan mengapa beliau perlu mencampuri pelaksanaan budibicara kehakiman oleh SAR. Selain dari nyataan bahawa faedah pra-penghakiman tidak diplid – ia tidak perlu diplid - tidak ada apa-apa bantahan oleh responden berkenaan kadar atau tempoh faedah tersebut. Oleh kerana tiada sebab-sebab sebaliknya, perintah SAR berhubung faedah pra-penghakiman dikekalkan.

[3] Berhubung dengan (c), yang arif hakim tidak membuat sebarang perintah tentang kos walaupun defendan berjaya sebahagiannya dalam rayuan terhadap award faedah pra-penghakiman. Di hadapan mahkamah ini, plaintif memenangi rayuan terhadap faedah pra-penghakiman tetapi kalah dalam rayuan terhadap kuantum. Oleh yang demikian, perintah yang adil adalah supaya setiap pihak menanggung kos masing-masing di sini dan di hadapan yang arif hakim.

Perintah sekadarnya.]

Case(s) referred to:

Central Malaysia Development Co Ltd v. Chin Pak Chin [1967] 2 MLJ 174 ***(refd)***

Hadley v. Baxendale [1854] 9 Exch 341 ***(foll)***

Imbi World Sdn Bhd v. Deluxe Tours Sdn Bhd [1997] 3 CLJ 504 (CA) ***(dist)***

Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co Ltd [1983] 1 MLJ 65 ***(foll)***

Lim Foo Yang & Sons Realty Sdn Bhd v. Datuk Eric Taylor [1990] 1 MLJ 168 (SC) ***(foll)***

Mohamed Abu Bakar Yusof v. PA Syed Aboothathir P Ahmed [1990] 1 CLJ 112; [1990] 2 CLJ (Rep) 482 (HC) ***(dist)***

Soong Ah Chow & Anor v. Lai Kok Cheng [1984] 1 CLJ 152; [1984] 1 CLJ (Rep) 360 (FC) ***(foll)***

Tan Sri Khoo Teck Puat & Anor v. Plenitute Holdings Sdn Bhd [1994] 3 MLJ 777 (FC) ***(refd)***

Wee Tiang Yap v. Chan Chan Brothers [1984] 1 CLJ 156; [1984] 1 CLJ (Rep) 433 (FC) ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 28(4)(a)

Contracts Act 1950, s. 74(1)

Control of Rent Act 1966, s. 16

Other source(s) referred to:

Sinnadurai, *Law of Contract*, 3rd edn, para 13.03

L Voumard, *The Law Relating To The Sale Of Land In Victoria*, 2nd edn, pp. 334, 337-340

For plaintiff/appellant - Richard WG Lee (Teh Eng Lay); M/s Cheah Teh & Su

For the defendant/respondent - Izzat Othman (Rozana Anuar); M/s Azzat & Izzat

[Appeal from High Court, Suit No: S5-22-390-1994]

Reported by Suresh Nathan

JUDGMENT

Denis Ong JCA:

This is an appeal by the plaintiff, Eight Development (M) Sdn Bhd, to this court against the judgment dated 25 November 1996 of the High Court in Kuala Lumpur which dismissed the appeals dated 20 August 1996 and 23 August 1996 of the plaintiff and of the defendant, Antara Steel Mills Sdn Bhd respectively to the judge in chambers from the judgment dated 20 August 1996 of the learned senior assistant registrar (SAR) entered in favour of the plaintiff and against the defendant on assessment of damages.

We heard this appeal on 22 and 23 October 2002 at the conclusion of which judgment was reserved. This is the judgment of the court.

The facts and background of this appeal may be summarised thus: by a sale and purchase agreement dated 8 October 1992 (the SPA) entered into between the parties, the plaintiff who was the purchaser purchased from the defendant, the vendor, two units of 4-storey shophouses identified as Nos. 42 & 44, Jalan Pandan 3/2, Pandan Jaya, Selangor Darul Ehsan (the shophouses) for a total purchase price of RM1,260,000. It was a term of the SPA that the defendant deliver to the plaintiff vacant possession of the shophouses free from encumbrances within seven days of the receipt of the purchase price. The purchase price was paid in full by or about 15 June 1993 and, in accordance with the agreement, vacant possession of the shophouses should have been given and taken on 23 June 1993 but not so. Vacant possession of the first, second and third floors of the shophouses was given and taken on 19 August 1993 signified by the handing over of the keys thereto.

It is an agreed fact that the defendant failed to deliver vacant possession of the ground floors (the premises) of the shophouses on the due date (i.e. 23 June 1993) as the premises were held over and in continued occupation by the tenants of the defendant namely, Leong Ban Pheng (Leong) and Chandrasegaram (Chandra).

It is an agreed fact too that on 6 July 1994 the plaintiff and the defendant as co-plaintiffs commenced separate suits No. S4-22-359-94 and No. S5-22-360-94 in the Kuala Lumpur High Court against Chandra and Leong respectively to recover vacant possession of the premises by way of injunctions, arrears of rent, double rent, damages, interest and cost for the period held over.

On 21 July 1994 the plaintiff filed a writ and statement of claim against the defendant on the footing that breach of the term in the SPA relating to vacant possession was breach of a covenant or obligation and sought for:

(i) a court order for vacant possession of the shophouses within 14 days of service of such order made;

(ii) damages to be assessed, including but not limited to double the market value of rental of the shophouses and/or mense profits as may reasonably be said to have naturally arisen from the defendant's breach or which may reasonably be supposed to have been in the contemplation of the parties as likely to arise from failure to deliver vacant possession from 23 June 1993 to the date when vacant possession was delivered;

(iii) interest on damages at the rate of 8% p.a. from the date of the court order until full payment; and,

(iv) costs.

On 25 August 1994 the plaintiff withdrew from the said suits No. S4-22-359-94 and No. S5-22-360-94 against Chandra and Leong leaving the defendant alone to continue with them.

On 20 October 1994 the transfer of titles to the shophouses from the defendant to the plaintiff was registered.

On 27 May 1995 vacant possession of the premises was given and taken by the plaintiff, Chandra and Leong having vacated before that date.

On 26 June 1995 the SAR, upon an O. 14 application by the plaintiff, gave summary judgment (in Bahasa) to the plaintiff, the English translation of which was in terms as follows:

> … IT IS THIS DAY ADJUDGED that:
>
> (a) The Defendant shall deliver vacant possession of the shophouses having the postal address of Nos. 42 & 44, Jalan Pandan 3/2, Pandan Jaya 55100 Kuala Lumpur;
>
> (b) The Defendant shall deliver vacant possession of the two shophouses having the postal address of Nos. 42 & 44, Jalan Pandan 3/2, Pandan Jaya, 55100 Kuala Lumpur in good clean and tenantable condition to the Plaintiff;
>
> (c) The Defendant shall deliver vacant possession of the two shophouses having the postal address of Nos. 42 & 44, Jalan Pandan 3/2, Pandan Jaya, 55100 Kuala Lumpur within 14 days of service of this Judgment;
>
> (d) The Defendant shall pay to the Plaintiff damages including but not limited to double the market value of rental of the two shophouses having the postal address of Nos. 42 & 44, Jalan Pandan 3/2, Pandan Jaya, 55100 Kuala Lumpur and/or mense profits as may reasonably be said to have naturally arisen from the Defendant's breach or which may reasonably be supposed to have been in the contemplation of the parties as likely to arise from the Defendant's failure to deliver vacant possession of the two shophouses having the postal address of Nos. 42 & 44, Jalan Pandan 3/2, Pandan Jaya, 55100 Kuala Lumpur from 23/6/93 to the date of delivery of vacant possession thereof to be assessed;
>
> (e) Interest at 8% per annum be paid by the Defendant to the Plaintiff on damages awarded from the date of this Judgment till date of full payment.

(f) Costs of the Plaintiff's application under Order 14 of the Rules of the High Court 1980 dated the 20th day of September, 1994 be taxed and paid forthwith by the Defendant to the Plaintiff.

(g) Costs of this action be taxed and paid by the Defendant to the Plaintiff.

AND IT IS FINALLY ADJUDGED that the assessment of the Plaintiff's damages as stated above be fixed on the 22nd day of August 1995.

By notice of appeal dated 28 June 1995, the defendant appealed to the judge in chambers against the decision of the SAR.

On 25 January 1996 the judge dismissed the appeal and confirmed the SAR's order as varied by him. The English translation of the orders of the judge (in Bahasa) read thus:

(a) the Defendant do pay the Plaintiff damages to be assessed by the Senior Assistant Registrar arising out of the failure of the Defendant to deliver vacant possession of the ground floor of two shophouses with the postal address of No. 42 & 44, Jalan Pandan 3/2, Pandan Jaya, 55100 Kuala Lumpur for the period of 23rd day of June, 1993 till the 27th day of May, 1995 that is till the date of delivery of vacant possession of the ground floor of the said two shophouses to the Plaintiff by the Defendant;

(b) the Defendant do pay the Plaintiff interest at the rate of 8% per annum on the award of damages from the date of this Judgment till the date of full payment by the Defendant;

(c) All costs before the Senior Assistant Registrar including costs of the Plaintiff's said application *vide* the said Summons In Chambers dated the 20th day of September 1994, costs of this action and costs of the assessment of the Plaintiff's damages be taxed and paid forthwith by the Defendant to the Plaintiff.

AND IT IS HEREBY ORDERED that there be no order as to costs for the Defendant's said Appeal.

There was no appeal from such order of the judge in chambers.

Hearing on assessment of damages before the SAR actually started on 2 April 1996 and concluded on 17 July 1996. On 20 August 1996 she made a brief pronouncement of her decision namely, that the defendant was to pay the plaintiff damages assessed at RM191,432.00 and interest thereon at the rate of 8% per annum from 23 June 1993 to 24 January 1996. On 26 September 1996 the grounds of her decision in writing were made available. On 22 January 1997 she certified her assessment of damages. In her grounds of decision, three issues were addressed by the SAR namely:

(a) whether the plaintiff's claim fulfils the requirements of s. 74(1) of the Contracts Act 1950 (Act 136);

(b) if the answer to (a) is in the affirmative, what is the rental value in the open market for the premises; and,

(c) whether the plaintiff can be awarded twice such rental value.

On (a) she found that there was loss of use to the plaintiff of the premises and more likely than not loss of rental receipts as well, as a result of the defendant's breach of the covenant to give vacant possession to the plaintiff for the period 23 June 1993 to 27 May 1996 caused by the continued occupation of Chandra and Leong. In this connection she also found on the evidence recorded that the defendant knew, at the time of the sale, of the plaintiff's intention to rent out the premises having been so informed by the latter. Thus she concluded that the first and second limbs of s. 74(1) of Act 136 had been fulfilled. On (b) she accepted the computation of rental estimate for the period 23 June 1993 to 27 May 1996 in the Valuation Report of SP-2 as reasonable compensation for the loss of use of the premises because land market values were fast on the increase in the nineties. On (c) she observed that s. 28(4) of the Civil Law Act 1956 (Act 67) applied where there was a relationship of landlord and tenant and was not applicable to the present case where the plaintiff was a purchaser (not a landlord) and the defendant was a vendor (not a tenant) and the reason for not giving vacant possession was because the tenants of the defendant continued to occupy the premises. In her view it would be a misuse by the court to invoke s. 28(4) and she refused the plaintiff's claim for double the amount of rent. She concluded that, on the evidence both oral and documentary, the plaintiff had succeeded in establishing compensation of RM191,432 plus interest at 8% per annum from 23 June 1993 to 24 January 1996 (pre-judgment) and gave judgment for the plaintiff accordingly on 20 August 1996. No order for post judgment interest on damages was made because, as she noted, the same had already been ordered by the judge on 25 January 1996.

On 21 August 1996 the plaintiff appealed to the judge in chambers against two parts of the decision of the SAR namely, (i) her refusal to allow the plaintiff to tender in evidence at the hearing on assessment of damages certain cause papers pertaining to suits No: S4-22-359-1994 and No: S5-22-360-1994; and (ii) her refusal to award damages at twice the market value rental which worked out to be RM382,864 instead of the single market value rental of RM191,432 awarded by her. On 23 August 1996 the defendant appealed against

two parts of her decision namely, (a) her award of RM191,432 as damages to the plaintiff and (b) her award of interest thereon to the plaintiff at the rate of 8% per annum from 23 June 1993 to 24 January 1996.

These separate appeals were heard together by the judge in chambers on diverse dates commencing from 30 November 1995 and concluding on 25 November 1996. The judge was of the opinion that s. 28(4) concerned the question of a landlord and his tenant and should not be applied indiscriminately to a situation where the claim for compensation was by a purchaser against a vendor. In the situation here on appeal the law to be applied was s. 74 of Act 136 and he upheld the market value rental assessed by the SAR as compensation to be paid. Such market value arose in the usual course from a breach of the SPA by the defendant. In substance he confirmed the quantum of damages amounting to RM191,432 assessed by the SAR as reasonable but disallowed interest thereon at the rate of 8% per annum for the period from 23 June 1993 to 24 January 1996 awarded by the SAR. He rejected the plaintiff's submission for double market value rental for the premises. In the result, he dismissed the respective appeals of the plaintiff and of the defendant and awarded no costs to either party.

To that extent only was the decision of the SAR varied on appeal to the judge in chambers. Against this judgment the plaintiff appealed to this court as indicated at the outset of this judgment. There was no appeal by the defendant.

On 28 January 1997 the defendant obtained interlocutory judgment against Chandra and Leong in suits No. S4-22-359-94 and No. S5-22-360-94.

Three matters were canvassed in argument before us by Mr Richard Lee of learned counsel for the appellant. They were:

(a) the judge's rejection of the plaintiff's submission for damages for the plaintiff equivalent to double the market value rental for the premises for the period 23 June 1993 to 27 May 1995 (matter (a));

(b) the judge's disallowance of pre-judgment interest on damages at the rate of 8% per annum from 23 June 1993 to 24 January 1996 directed by the SAR (matter (b)); and,

(c) that the judge should have directed costs to be paid to the plaintiff by the defendant in respect of the defendant's appeal dated 23 August 1996 before him (matter (c)).

On matter (a), it was common ground that there was failure to give vacant possession of the premises on the due date and hence a breach of the SPA. Such a breach had resulted in loss of use of the premises to the plaintiff. It was also common ground that the legal principle in s. 74(1) of Act 136 was applicable to the facts of this case in the assessment of compensation and was actually applied by the SAR in the computation of the compensation to arrive at the figure of RM191,432.

Further, there was common ground between the parties that breach of the SPA and loss of use of the premises for that period was due to the continued wrongful occupation by Chandra and Leong holding over as tenants of the defendant who was their landlord.

On such analysis of the facts, Mr. Lee argued that the defendant's breach of the SPA was "interwined with" "inextricably linked to or caused by a tenant holding over" and "such tenant being the tenant of the party in breach" of the SPA. This particular factor, according to counsel, distinguished this case from the run-of-the-mill breach of contract cases. On that footing he formulated the question for the court's determination thus:

> whether a purchaser of immovable property and who is wrongfully denied possession of the property he has purchased is entitled to rely upon section 28(4)(a) of the Civil Law Act 1956 when claiming damages for the period he was kept out of possession of the immovable property?

And he submitted that the answer to that question ought to be in the affirmative. He asserted that under s. 28(4)(a), a landlord is entitled to charge double the rental value on a tenant holding over after the determination of the tenancy. S. 74 of Act 136 allows for compensation for loss or damage caused by breach of contract. However, where the breach of contract was inextricably linked to or caused by a tenant holding over, such tenant being the tenant of the party in breach (as in the present case), s. 28(4)(a) should then be read with s. 74 so that the amount of damages awarded under s. 74 would be doubled. In support of his argument he pointed out that in at least two instances namely, *Imbi World Sdn Bhd v. Deluxe Tours Sdn Bhd* [1997] 3 CLJ 504 (CA) and *Mohamed Abu Bakar Yusof v. PA Syed Aboothathir P Ahmed* [1990] 1 CLJ 112; [1990] 2 CLJ (Rep) 482, s. 28(4)(a) was used to award a plaintiff double rental even though the plaintiff concerned was clearly not in a landlord-tenant relationship with the defendant.

In his submission on (a) above, Mr Izzat Othman of learned counsel for the defendant made the following points:

(i) the breach complained of was a breach of the SPA; thus the plaintiff could only claim compensation for breach of the SPA. The plaintiff was not privy to the tenancy agreements with the tenants.

(ii) the provisions of s. 28(4)(a) of Act 67 are clear and applicable only in a landlord-tenant relationship.

(iii) the judge had decided and correctly that s. 28(4)(a) was not applicable in this action and that the provisions of s. 74 of Act 136 applied.

(iv) s. 28(4)(a) should be given a literal interpretation where it is plainly and clearly provided that it applies only in a landlord and tenant relationship. The court is only called upon to construe where there is a lacuna or ambiguity in the laws.

From their submissions before the SAR, the judge and before us, it was accepted on both sides that s. 74 of Act 136 applied to the facts of the present case and both the SAR and the judge held that it so applied. There was no appeal against that holding which was thus final and no longer an issue before us. Before us too, there was no dispute that the single monthly rent for the premises was RM4,000 per month for the period 23 June 1993 to 23 June 1994 and RM4,300 per month for the period 24 June 1994 to 27 May 1995 which were accepted by the SAR and the judge and based on these, compensation was assessed in the aggregate sum of RM191,432.

The issue contested before the SAR, the judge and before us was whether s. 28(4)(a) applied to the facts of the present case and should be read with s. 74 of Act 136.

Subsection (4)(a) of s. 28 reads thus:

> (4)(a) Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.

Section 28(4)(a) speaks of landlord and tenant, a tenancy, possession, rent, double the amount of his rent, value, double the value, holding over after determination, and detention of the land or premises. It is plain to us that it applies only where there existed a landlord and tenant relationship and there is holding over of the premises. The consideration for the use and occupation of

the land or premises is the rent payable by the tenant to the landlord while the tenancy runs, the amount of the rent and the term of the tenancy will have been fixed by the tenancy agreement. If the rent is payable monthly under the agreement, only a single month's rent is due to be paid. If the tenancy expires and the tenant continues in occupation of the land or premises without an extension first agreed upon, the tenant is said to hold over. When that happens s. 28(4)(a) gives the landlord the option to charge double the amount of the monthly rent until possession is given up by the tenant or double the value during the period of detention of the land or premises.

The Federal Court in a majority judgment in *Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co Ltd* [1983] 1 MLJ 65 has made certain pronouncements on the nature and construction of s. 28(4)(a) thus:

> Respondents submitted that the word "shall" is mandatory. On the other hand, appellant submitted that the words "shall be chargeable" in the said section gave the court a discretion. The question whether the legislature intends a provision to be mandatory or discretionary must depend in each case on the scope, object and general scheme of the enactment. The Control of Rent Act, 1966 expressly enacts that where a tenancy exists the rent shall not be increased beyond certain prescribed limits. How are we then to infer from the statute an intention to alter the law where no tenancy exists, where there is no landlord and no tenant? Clearly, there is no obligation to pay rent. However, the legislature has, in another Act, used the words "double the amount of his rent". The respondents' claim is actually not rent but a penal sum which the former tenant has to pay for the inconvenience and loss he causes the landlord in refusing to give vacant possession of the premises on the determination of the tenancy. The provision, being penal in nature, must be construed with some degree of stricture. In awarding damages the court always has a discretion. Respondents are asking the court to apply the doctrine of relation back. Damages can only be recovered as from the determination of the lease, whatever form it may take, whether by effluxion of time, notice to quit or by re-entry under a proviso for that purpose. …
>
> In *Crook v. Whitbread* the tenant continued to be in occupation after the expiration of the notice to quit and tendered the quarter's rent due but the landlord refused it. Subsequently, the landlord brought an action claiming double value under the Landlord and Tenant Act, 1730 and alternatively for use and occupation. Held, that, having regard to the provisions of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 which contemplated that so long as the tenant continued to pay the rent agreed and to perform the conditions of the tenancy, he should not be turned out of

occupation, the defendant could not be said to be holding over contumaciously and was therefore not liable for double value under the 1730 Act. In dismissing the appeal from the decision of the County Court Judge Avory, J. referred to four cases and said at page 961:

> In all those cases it held that there must be something in the nature of contumacy on the part of the tenant in holding over to render him liable to double value.

Although the provisions of section 28(4)(a) of the Civil Law Act may not be the same as the provisions of the Landlord and Tenant Act, 1730, *Crook v. Whitbread* does support the view of the learned Judge, that is, to avoid double rent if the tenant's conduct in holding over the premises had been unreasonable.

These pronouncements of the majority of the Federal Court were consistently adhered to in *Wee Tiang Yap v. Chan Chan Brothers* [1984] 1 CLJ 156; [1984] 1 CLJ (Rep) 433 (FC):

> Our attention has also been drawn to the decision of this Court in *Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co. Ltd.* [1983] 1 MLJ 65 in particular the dissenting judgment therein.
>
> We note that the majority judgment was based on an English authority *Crook v. Whitbread*. Under section 1 of the English Landlord and Tenant Act, 1730 doing "wilfully" is a requirement. Our section does not contain that requirement. However, on the facts of the case in the present appeal, even if a wilful act is required, the respondents had wilfully remained on the premises after expiry of the period of notice.
>
> Accordingly, this appeal is allowed, in terms of the prayer set out in the amended Statement of Claim. The respondents are ordered to quit and deliver vacant possession of the premises within 3 months of the delivery of this judgment, and to pay double rent from March 1, 1976, from which date the notice to quit came into force.

and in *Soong Ah Chow & Anor v. Lai Kok Cheng* [1984] 1 CLJ 152; [1984] 1 CLJ (Rep) 360 (FC):

> Section 28(4) (a) of the Civil Law Act 1956 provides that every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double rental until possession is given up by him. The effect of section 28(4) (a) was examined in *Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co. Ltd.* [1983] 1 MLJ 65 The majority judgment

> held the view that the court has discretion when to impose double rent. It seems to me that the legislature's choice of the words "shall be chargeable" clearly implies some discretion. But a more difficult question is the extent of the discretion. In *Panicka*'s case the trial Judge had found that the parties had come to some sort of understanding and considered it to be unconscionable for the respondents to claim double rent from the expiry of the notice. The majority judgment saw no reason to interfere with the exercise of this discretion.

From the facts outlined above, it was clear to us that there existed two separate and distinct types of legal relationship in the present appeal namely,

(i) the landlord and tenant relationship which subsisted between the defendant on the one hand as landlord and Chandra and Leong on the other as tenants under the tenancy agreements relating to the premises including the holding over, and such relationship should have ceased on 20 October 1994 but continued until 27 May 1995; and,

(ii) the vendor and purchaser relationship which subsisted between the defendant as vendor and the plaintiff as purchaser under the SPA concerning the premises which should have ceased on 20 October 1994 but continued until 27 May 1995.

In the light of what have just been said, s. 28(4)(a) is clearly applicable to the relationship in (i) above as there was holding over and the option to charge Chandra and Leong, the tenants, double the amount of rent or double the value for the period held over was that of the defendant as the landlord.

In respect of the relationship in (ii) above, it is equally clear that s. 28(4)(a) does not apply for two reasons. Firstly, at all material times, the premises were in fact occupied by Chandra and Leong; they were never occupied by the defendant at any time and who paid no rent to the plaintiff. There was no tenure between them and consequently no relationship of landlord and tenant. It follows from these that no issue of the defendant holding over the premises or the plaintiff acquiring an option to charge double rent or double the value ever arose. Secondly, there was never any suggestion by the plaintiff that the defendant paid rent to the plaintiff for the occupation of the premises by Chandra and Leong. Nor was it ever suggested that the occupation of the premises by Chandra and Leong was by the authorisation of the defendant. There was thus no link or basis whatever in law to suggest that Chandra and Leong were agents or servants of the defendant. It was a fact that there was holding over of the premises by Chandra and Leong until 27 May 1995 but

that was in relation to the separate tenancies they had with the defendant as landlord and tenants referred to in (i) above and certainly not as agents of the defendant vis-a-vis the plaintiff when there was no tenure between the plaintiff and the defendant.

In respect of the relationship in (ii) above, the relevant covenant identified in the SPA is a covenant by the defendant (as vendor) to the plaintiff (as purchaser) whereby the former is to give and the latter is to take vacant possession of the premises seven days after settlement in full of the purchase price which, the parties agreed, worked out to be 23 June 93. This covenant was breached by the defendant as actual possession was not given on the due date because of the continued occupation by Chandra and Leong the tenants who held over. Vacant possession was not given until 27 May 1995. There was thus a delay of 23 months and 4 days in giving vacant possession of the premises. In such a situation the principles of law applicable are stated by L Voumard - *The Law Relating To The Sale Of Land In Victoria*, 2nd edn, thus:

at p. 334:

> Under a condition providing simply that at the stipulated time the purchaser is to have possession of the property, the word "possession" has the primary meaning of "vacant possession" but in each particular case the precise right of the purchaser will depend upon the terms of the contract. … Where the vendor is himself at the date of the contract in occupation of the property sold he will be bound under this condition to give the purchaser vacant possession (unless …).

at p. 337:

> Failure to give vacant possession occasioned by the wrongful holding over of a tenant or the presence of an adverse occupier does not constitute an inability to make a good title, and accordingly a purchaser, by accepting title, will not in these circumstances be deemed to have waived any of his rights under the contract; and the vendor will not, by reason of the acceptance of the title, be relieved of his obligation to give undisturbed possession on the date stipulated in the contract.

at p. 338:

> It has already been seen that a wrongful overholding by a tenant (i.e., a continuance in occupation by a tenant whom the vendor is legally entitled to evict) does not constitute a defect in the vendor's title. …

at p. 339 – 340:

> Where delay in giving possession proceeds not from a want of title, but from some cause within the control of the vendor, such as wilful refusal to give vacant possession without any genuine belief that he will be able to do so, or to the vendor not having cared, or troubled, or taken reasonable pains to perform his contract" , the purchaser will be entitled to recover substantial damages for his loss of possession. Thus, substantial damages for delay in giving possession may be recovered where such delay arises from the wrongful holding over of a tenant, or … The measure of damages in these circumstances is the loss which may reasonably be said to have naturally arisen from the delay or which may reasonably be supposed to have been in the contemplation of the parties as likely to arise from the partial breach of contract; but where the purchaser recovers general damages for breach of the contract, he is not entitled to recover in addition his expenses of investigation the title."

Firstly, and for the record neither the SPA nor the tenancy agreements with Chandra and Leong are included in the appeal record. Consequently, we are not to know of the provisions of the covenant pertaining to delivery of possession and what relief, if any, is expressly provided for in the SPA in the event of delay or failure to deliver in time or of any further provisions regulating the accountability of each party to the other concerning incomings and outgoings after the date of settlement. We mention this in connection with the learned author's observation that the precise right of the plaintiff as purchaser will depend on the terms of the contract.

Secondly, the defendant, as vendor, has never been in occupation of the premises at any time. Thus with reference to the defendant, the covenant to give vacant possession of the premises as such and any suggestion of wilful refusal on its part to comply, has little or no bearing whatever to the facts of the present appeal. Likewise too is the court order commanding the defendant to give vacant possession of the premises as the SAR did on 26 June 1995 not-withstanding the fact that Chandra and Leong had already vacated the premises by 27 May 1995. In this connection, we would remark in passing that the judge is right to have appropriately varied that order of the SAR on appeal to him on 25 January 1996. We mention these with reference to the learned author's statement of the legal principle that a covenant to give vacant possession is binding on the vendor where such vendor itself is in occupation at the date of the contract and more particularly, to make a point that that principle is not applicable to the defendant in our present appeal.

Thirdly, it is never the plaintiff's case that failure on the part of the defendant, as vendor, to give vacant possession on the due date occasioned by the wrongful

holding over by Chandra and Leong constituted a defect in the defendant's title to the premises. As pointed before, the claim of the plaintiff for vacant possession is on the footing that breach of that term in the SPA constituted breach of a covenant or obligation. We mention this with reference to the learned author's statements at pp. 337 and 338 quoted above.

Fourthly, it is a fact that there was holding over of the premises by Chandra and Leong from 23 June 1993 until 27 May 1995, a delay in giving possession to the plaintiff of 23 months and 4 days during which period the plaintiff suffered loss through being deprived of the use of the premises. Mr Lee attributes such delay to the defendant, not because it wilfully refused to give vacant possession of the premises but because Chandra and Leong who held over were tenants of the defendant. In the absence of agency between the tenants and the defendant as earlier pointed out, there is no legal basis to hold the defendant vicariously liable for the acts of Chandra and Leong. However, the issue before us is not whether the defendant was liable to the plaintiff, liability having been accepted by the defendant and settled before the SAR and the Judge. The problem is about identifying the true rationale for saying that the defendant was liable. The only relevant legal principle upon which liability may justifiably be attributed to the defendant appears to us to be that the defendant, as vendor, did not care or trouble or take reasonable pains to perform its contract with the plaintiff as the learned author stated at p. 340 quoted above. In short, the covenant to give vacant possession of the premises to the plaintiff as purchaser on a given date involves an obligation on the part of the defendant as vendor to use its best endeavours to evict the tenants as it was legally entitled to do so in order to comply with the covenant. In this regard, it is note-worthy that the due date of giving vacant possession of the premises was 23 June 1993 and suits No. S4-22-359-94 and No. S5-22-360-94 were only commenced on 6 July 1994. There was lapse of a year during which no court action was taken by the defendant to evict the tenants. It had neglected its obligation for too long.

In these circumstances the measure of damages applicable at common law to the relationship in (ii) above is the rule laid down in *Hadley v. Baxendale* [1854] 9 Exch 341 which is stated by the learned author at page 340 quoted above. Section 74(1) of Act 136 is the statutory enunciation of such rule which has been acknowledged by the Federal Court in many cases (*See* Sinnadurai, *Law of Contract*, 3rd edn, para 13.03 for an enumeration of such cases). Section 74 of Act 136 is applicable to a claim for damages for breach of a contract to sell land (*Central Malaysia Development Co Ltd v. Chin Pak Chin*

[1967] 2 MLJ 174, *Lim Foo Yang & Sons Realty Sdn Bhd v. Datuk Eric Taylor* [1990] 1 MLJ 168 (SC), *Tan Sri Khoo Teck Puat & Anor v. Plenitute Holdings Sdn Bhd* [1994] 3 MLJ 777 (FC)). As has been stated before, it was accepted on both sides that s. 74 of Act 136 applied to the facts of the present case so that it is no longer an issue before us. Subsections (1) and (2) of s. 74 provide as follows:

> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Section 74(1) consists of two limbs: damages under the first limb is generally described as 'general damages' and that under the second limb as 'special' damages. Prayer (ii) of the plaintiff's statement of claim is worded thus:

> (ii) damages to be assessed, including but not limited to double the market value of rental of the shophouses and/or mense profits as may reasonably be said to have naturally arisen from the defendant's breach or which may reasonably be supposed to have been in the contemplation of the parties as likely to arise from the failure to deliver vacant possession from 23.6.93 to the date when vacant possession was delivered.

It is evident from the wording of prayer (ii) that it is modelled on the rule, in *Hadley v. Baxendale* and is for damages under both limbs of that rule that is to say, for general and special damages. It also incorporates a claim for double market value rental under s. 28(4) and/or mense profits.

As pointed out above, s. 28(4) does not apply to the facts of the present appeal chiefly because the defendant never at anytime occupied or held over the premises. Section 28(4) is penal in nature and ought to be construed with some degree of stricture and double the market value therein is a penal sum as the Federal Court has said in *Sreedhara Panicka'*s [1983] 1 MLJ 65. To invoke the use of that subsection and to award double the market value to the plaintiff against the defendant would be to penalise the wrong person and as the SAR said, not incorrectly, a misuse of that subsection. Further, the nature of the obligation of the defendant (as vendor) to the plaintiff (as purchaser) under the covenant to give vacant possession of the premises on the due date differ

substantially depending upon who wilfully held over the premises that is, whether it is the vendor himself or the tenants of the vendor as earlier explained. In fact and in law, Chandra and Leong were the ones who continued in occupation of the premises and held over as tenants *vis-a-vis* the defendant as landlord. The option to charge double the value under s. 28(4) would seem to be that of the defendant alone. This point might well be relevant in suit nos: S4-22-359-94 and S5-22-360-94 but not in this appeal as Chandra and Leong are not parties from the start. In relation to the plaintiff in the other context of the SPA, Chandra and Leong are strangers; s. 28(4) has no application and consequently no such option for the plaintiff.

Mr. Lee cited *Mohamed Abu Bakar*'s case and *Imbi*'s case in support of his argument that this Court has the power under s. 28(4)(a) to double the award of damages by the SAR and the judge.

In *Mohamed Abu Bakar*'s case, the defendant was in wrongful occupation of the business premises of which the plaintiff was the registered proprietor. The plaintiff sued the defendant for trespass and prayed for an order to evict the defendant, vacant possession of the premises and mense profit.

The defence pleaded that the defendant was a tenant in lawful occupation of the premises and was protected by s. 16 of the Control of Rent Act 1966 (Act 363).

The magistrate held that the defendant was liable and awarded damages to the plaintiff but without quantifying such damages and also ordered no costs without any reason given.

The defendant appealed against the decision and the plaintiff cross-appealed to the High Court against the orders concerning damages and no cost.

In the course of the trial before the magistrate, evidence was recorded without objection from the plaintiff which evidence enabled the defendant to submit an alternative defence at the hearing of the appeal before the judge that he was a licensee although that was not pleaded or made a ground of appeal. Nonetheless the High Court considered the submission and concluded on such evidence that the defendant was neither a tenant nor a licensee but a trespasser in wrongful occupation of such premises.

The High Court affirmed the order for possession made by the magistrate and ordered the defendant to quit, vacate and yield vacant possession of the premises to the plaintiff within one month from the date of its judgment. On the quantum

of damage, it directed that damages should be computed on the basis of double the market rental value at $109 per month from the date of expiry of the notice to quit i.e. 1 July 1979 to the date when possession was handed over to the plaintiff but that the quantum of such damage was not to exceed the limit of jurisdiction of the magistrate to award. In making that direction the High Court said that it had regard to the provisions of s. 28(4)(a) and the power of the court thereunder to award damages/ or mense profits in actions for recovery of immovable property, when the occupant had wrongfully held over, from the date of accrual of the cause of action to the date when possession was handed over. The appeal was thus dismissed and the cross-appeal allowed.

It is apparent to us that the facts in *Mohamed Abu Bakar*'s case are quite different from those of the present appeal. Mohamed Abu Bakar, cited as the defendant in that case, was in actual occupation of the business premises not as a tenant or ex-tenant or licensee but as a trespasser, a tortfeasor. The cause of action was in tort for trespass (recovery of immovable property). As said before, the defendant in the present appeal was never at any time itself in occupation of the premises. The persons in actual occupation were Chandra and Leong who held over the premises and who were not cited as parties to the present appeal. The status of the defendant in the present appeal was that of a vendor *vis-a-vis* the plaintiff who was the purchaser and their status and relationship with one another were governed throughout by the SPA. The cause of action was in contract for breach of a covenant to give vacant possession on a certain date, the nature of the obligation of the defendant (as vendor) to the plaintiff (as purchaser) under that covenant as already pointed out before differed from that of the defendant (as a trespasser actually on the business premises) to the plaintiff (as a registered proprietor of the business premises) in *Mohamed Abu Bakar*'s case.

Taking these differences into consideration we do not accept that the position of the defendant in the present appeal corresponds to that of the defendant in *Mohamed Abu Bakar*'s case whose position appears to resemble that of Chandra and Leong.

In outline, the facts of *Imbi*'s case appears to be rather similar to those of the present appeal in that there was a sale and purchase agreement in writing entered into on 20 July 1992 between the 1st appellant and the 2nd appellant in that case for the sale by the former to the latter of the land and buildings erected thereon for the price of RM20 million. There was a provision in the agreement that the 1st appellant was to deliver to the 2nd appellant vacant possession of the property on receipt of the balance of the purchase price. Such

balance amounting to RM18 million was paid to the 1st appellant on 28 January 1993 and the transfer of the property to the 2nd appellant was effectuated on 5 May 1993.

On two units of the building was a tenant (the respondent) of the 1st appellant who was given a written notice dated 30 July 1992 by the 1st appellant of the termination of the monthly tenancy and to vacate the units by 31 August 1992. The respondent stayed on, notwithstanding the notice, until 28 February 1994.

Suit No. S5-22-583 was commenced by the 1st and 2nd appellants against the respondent claiming for vacant possession of the 2 units and for double rental from 1 September 1992 to 4 May 1993 to be paid to the 1st appellant and from 5 May 1993 to 28 February 1994 to be paid to the 2nd appellant at RM7,200 per month with interest on the double rental at the rate of 8% per annum.

The High Court refused an application for summary judgment under O. 14 of the RHC because there was a triable issue as to whether the respondent was a yearly tenant or a monthly tenant.

The Court of Appeal allowed an appeal by the appellants against the High Court decision and held, amongst others, that there was no triable issue because (1) the respondent conceded that the tenancy in dispute was a monthly tenancy which concession was supported by documentary evidence: that fact meant that the notice to quit was valid and that the respondent was in wrongful occupation of the two-units by holding over after its expiry and further that subsequent delivery of vacant possession of the two-units indicated that the respondent knew that he was in wrongful occupation; and (2) that the respondent agreed to pay double rental to the 1st appellant for the period up to 5 May 1993 and also to the 2nd appellant after that date until delivery of vacant possession on 28 February 1994.

It would be observed that the position of the 2nd appellant in *Imbi*'s case corresponded with that of the plaintiff in the present appeal in that both were vendors and landlords whilst that of the respondent in *Imbi*'s case corresponded to that of Chandra and Leong in that they were all ex tenants holding over and in wrongful occupation of the premises. The position of 1st appellant in *Imbi*'s case corresponded to that of the defendant in the present appeal in that both were purchasers.

The differences in *Imbi*'s case from the present appeal were that the cause of action there was specifically under s. 28(4)(a) for double rental against the respondent who was cited as a party. In the present appeal, Chandra and Leong were not cited as parties and there was no proceeding by the plaintiff against them under s. 28(4)(a) for double rental. Instead, the plaintiff sued the defendant alone in contract for compensation under s. 74(1) of Act 136 for breach of a covenant in the SPA to deliver vacant possession of the premises by a certain date and incorporated in that prayer for good measure a claim for double rental under s. 28(4)(a). *Vis-a-vis* the 1st appellant and the 2nd appellant in Imbi's case1, no issue of double rental under s. 28(4)(a) was taken up by the latter against the former. That was an issue between the 2nd appellant and the respondent which was resolved by agreement between them that the respondent would pay the 2nd appellant double rental from 5 May 1993 to 28 December 1994. The Court of Appeal in that case merely acted upon that agreement. The point we wished to make here was that no where in the judgment of the Court of Appeal in *Imbi*'s case did it hold that the 1st appellant was liable to pay double rental under s. 28(4)(a) to the 2nd appellant because the respondent who held over in wrongful occupation was a tenant or ex tenant of the 1st appellant.

Thus we found that neither *Mohamed Abu Bakar*'s case nor *Imbi*'s case supported Mr Lee's argument.

In the light of the foregoing, we conclude that s. 74(1) of Act 136 applies to the relationship in (ii) above and that s. 28(4)(a) does not. Accordingly, in answer to Mr. Lee's question we hold that the plaintiff is not entitled to rely on s. 28(4)(a) when claiming damages under s. 74(1) of Act 136. Thus we uphold the decision of the SAR and the judge on matter (a).

On matter (b), pre-judgment interest was awarded by the SAR on the damages of RM191,432 at the rate of 8% p.a. from 23 June 1993 to 24 January 1994 at the request of Mr. Lee to which there was no response recorded from Mr. Izzat. On appeal the judge disallowed it. It was common ground that there was no submission by either side before the judge on the pre-judgment interest. No reason was given by the judge for disallowing such interest.

Mr Izzat's only point taken before us was that pre-judgment interest was not prayed for in the statement of claim. Mr. Lee could not very well have denied that point for it was obvious. He conceded but argued that the matter of pre-judgment interest came within "any other order of court" prayed for in the statement of claim.

Mr. Izzat's point raised an issue of whether it was necessary to plead pre-judgment interest in the statement of claim. On this issue the Federal Court in *Lim Eng Kay v. Jaafar* [1982] CLJ 298; [1982] CLJ (Rep) 190 ruled in the negative:

> V. Interest
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> …
>
> The ordering of interest to be included in a sum awarded for damages is a judicial discretion. Section 11 of the Civil Law Act 1956 (Malaysia Act 67) gives a fairly wide discretion to the court to order interest on a sum adjudged by the court in cases where a claimant succeeds in proceedings for the recovery of debts or damages. The English equivalent to our section 11 of the Civil Law Act 1956 was section 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934. But this section was repealed and replaced by section 22 of the Administration of Justice Act 1969 which came into effect on January 1, 1970. The change in the law simply means that the court in England is now obliged, instead of being at its discretion, to award interest; but the principles as to how and in what manner interest is awarded remain the same (per Lord Denning M.R. in *Jefford v. Gee* [1970] 1 All ER 1202). Thus although in England interest is compulsory but because the principles by which the court awards interest are not changed the result is very much the same as before and therefore similar to the position obtaining in our law. Prior to the passing of the Law Reform (Miscellaneous Provisions) Act 1934, under common law the court had always had discretion to award interest as a compensation for a party who has been deprived of the use of its money to which it is legally entitled. The enactment of the judicial discretion by the statute simply gives statutory effect thereto, one of which is that it is not necessary for a plaintiff to claim interest in his pleadings as the court can award interest without any claim being made in the pleadings. (*Riches v. West-minister Bank Ltd* [1943] 2 All ER 725.
>
> … Interest is not awarded as a compensation on account of inflation, but awarded because an injured plaintiff has been deprived of the use of money to which he is entitled. This view was already accepted by this court in *Murtadza bin Mohamed Hassan v. Chong Swee Pian* [1980] 1 MLJ 216.

Although no reason was stated for the SAR's decision to award pre-judgment interest there was evidence recorded to justify the award and no doubt she would have appropriately addressed her mind to them when exercising her judicial discretion under s. 11 of Act 67 having regard to the award she made which specified the period i.e. from 23 June 1993 to 24 January 1996 and the rate of interest at 8% per annum.

The sum of RM191,432 awarded by the SAR was not mense profits or damages under s. 28(4)(a). Neither was it special damages under the second limb of s. 74(1) of Act 136. It was general damages under the first limb of s. 74(1) of Act 136 for loss of use of the premises consequent upon a breach of the covenant to deliver vacant possession to the plaintiff on time. From the computation of damages set out in the judgment of the SAR, it is obvious that no account was taken of any element of interest. In short, no interest was included in the figure of RM191,432. The award remained unpaid to the plaintiff and it was deprived of the use of the moneys due to it from 23 June 1993 to 24 January 1996.

The judge stated no reason whatever for interfering with the exercise by the SAR of her judicial discretion. Apart from the point of pleading which we already dealt with, there was no complaint by Mr. Izzat about the rate or the period of such interest. So shall they remain. In short, no ground had been shown to us as to why the SAR's award should not be restored.

On matter (c), it would be observed that both the plaintiff and the defendant lost in their respective appeals before the judge on 25 November 1996. However, the defendant won in its appeal against the award of interest for the said period and the plaintiff lost on that score. However, the judge made no order as to costs despite the defendant's partial success. It occurred to us that if anyone was to appeal to this court against that order, it should have been the defendant who at least scored a partial success over the plaintiff at the High Court. However, the defendant did not appeal; instead the plaintiff appealed.

Before us the plaintiff lost in its appeal against quantum and on that score the defendant won. However, the plaintiff won in its appeal on pre-judgment interest which the defendant lost. In our view a fair order would be that each party bears its own costs here and before the judge.

In conclusion we uphold the judgment of the judge on the quantum of damage. We set aside the judge's order on pre-judgment interest and cost, restore the order of the SAR on pre-judgment interest and make an order that each party bears its own costs here and before the judge. To that extent the appeal is allowed. The deposit is to be refunded to the plaintiff. Order accordingly.